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Instream Uses Twenty-Five Years Later: Incremental Progress or Revolving Door?

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I. INTRODUCTION

There is a certain irony in the fact that Governor Jerry Brown appointed a Commission to revise California's water rights law a few short years after one of his father's greatest achievements, the California Water Project, had been approved by the voters. The Oroville, Shasta, and Friant dams were just beginning to affect the waters and wildlife in ways their designers had not contemplated. The environmental impacts these dams, and a host of smaller projects, were causing in the state's rivers were just beginning to be felt. Today, the federal and state governments are coping with the adverse effects of these projects at an enormous cost. Fish, farmers, and city-dwellers are all competing for a finite amount of water, in large part under rules established for a State whose population was a quarter of the size of today's California.

While the Commission's recommendations for reform were rejected, the holders of water rights today nevertheless stand in a very different position from that of their 1978 counterparts. The California Supreme Court has made it clear that water is a public resource, that uses are constantly modifiable in light of current circumstances under California's constitutional reasonable use doctrine and the public trust, and that the state has a continuing duty as trustee to review its uses and modify them as necessary.[1] The public trust doctrine has entered the water rights arena and prevents the acquisition of vested rights to appropriate water in a manner harmful to the interests protected by it.[2]

Over a hundred years after John Wesley Powell was hounded from the Department of Interior for his heretical depiction of the arid west, California has not yet fully come to terms with the reality of its hydrological limitations. Reform today, as it was in 1978, is a slow and painful process. The Governor's Commission was ahead of its time then, and its cautious concerns for instream values are finding acceptance only slowly and reluctantly in much of the water and development world.

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1. *See* Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 727-28 (Cal. 1983); Los Angeles Dep't of Water & Power v. Nat'l Audubon Soc'y, 464 U.S. 977 (1983).

2. *Id.* at 727; CAL. CONST. art. X, § 2.

II. THE COMMISSION IDENTIFIED PRINCIPAL ISSUES STILL WITH US TODAY

In many ways, the Commission was prescient in its discussion of instream uses. It described a system of degraded fisheries, largely due to insufficient instream flows caused by water projects, and called for reconciliation and accommodation of water uses in order to protect instream resources.[3] It identified the major problems in then existing processes for instream protections, and both expressly and impliedly suggested a number of reforms.

A. *The Commission Recognized the Significance of the State Board's Role in Protecting Instream Uses Within the Context of Water Rights Proceedings*

The Commission characterized the water rights system administered by the State Water Resources Control Board ("SWRCB") as "the principal source of protection of instream uses."[4] However, the report concluded that the ad hoc nature of the application and protest procedure, lack of adequate data, failure to follow up, and the absence of any requirement that instream flow requirements be imposed consistently impaired the efficacy of any instream protections that might be imposed.[5]

B. *The Commission Identified the Need for Permit Modifications in Light of Changing Circumstances*

The Commission generally concluded that the Board could modify permit conditions for instream protection "only if it has reserved jurisdiction specifically for that purpose."[6] Of course, since then, *National Audubon Society v. Superior Court* has made it clear that there is no vested right to continue using water in a certain way if changed circumstances or knowledge call for a different result.[7] The Court of Appeal expanded on this in the much-cited "Racanelli" opinion.[8] It asserted that the trust applies to all appropriative rights and that the State Water Resources Control Board ("SWRCB") may modify permits to prevent waste or unreasonable use independently of any reserved powers.[9]

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3. GOVERNOR'S COMMISSION TO REVIEW CALIFORNIA WATER RIGHTS LAW, FINAL REPORT 99-100, 112-13 (Dec. 1978) [hereinafter FINAL REPORT].

4. *Id.* at 105.

5. *Id.* at 106-07.

6. *Id.* at 103.

7. 658 P.2d 709, 728 (Cal. 1983).

8. United States v. State Water Res. Control Bd., 227 Cal. Rptr. 161 (Ct. App. 1986). Since Justice John Racanelli is the author, the opinion is commonly referred to by his name.

9. *Id.* at 201-02.

C. The Commission Rejected the Concept of Instream Appropriations

The Commission rejected the concept (as did the courts a few years later) and there has been no serious effort to adopt them.[10] However, in 1991, the California Legislature authorized the dedication of existing water rights to instream environmental purposes.[11]

D. The Commission Discussed Whether a Diverter Could be Required to Protect Instream Values by Using an Alternate Method of Diversion[12]

Five years later, the California Supreme Court supplied an affirmative answer in *National Audubon*.[13] In the Lower American River litigation, Judge Richard Hodge discussed whether a diverter could be required to use an alternate method of diversion at length in his much-cited opinion applying the trust and reasonable use doctrines.[14] Ultimately, he rejected such a requirement in favor of a physical solution imposing minimum flows and restricting purposes for which the water could be utilized.[15]

E. The Commission Recommended Weighing Uses

The Commission suggested that "[i]n principle, a well conceived system for allocating water among instream and off stream beneficial uses would weigh the relative value of competing uses."[16] In a somewhat sardonic understatement, the Commission added "[t]he various instream uses should participate equally in the present system for allocating water supplies, but it does not appear that they do."[17] Since then, balancing has been employed both in determinations of

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10. Fullerton v. State Water Res. Control Bd., 153 Cal. Rptr. 518, 603 (Ct. App. 1979); California Trout, Inc. v. State Water Res. Control Bd., 153 Cal. Rptr. 672 (Ct. App. 1970). Nevertheless, as the court observed in *National Audubon Society*, the Board may protect such uses by withholding water from appropriation. 658 P.2d at 726. Other western states have authorized instream appropriations. Richard Ausness, *Water Rights, the Public Trust Doctrine, and the Protection of Instream Waters*, U. ILL. L. REV. 407, 429-30 (1986).

11. 1991 Cal. Stat. ch. 663, § 2 (codified as CAL. WATER CODE § 1707 (West Supp. 2004)). Unfortunately, this provision has rarely been utilized. DONALD B. MOONEY & MARSHA A. BURCH, THE TRUST FOR PUBLIC LAND, WATER ACQUISITION HANDBOOK 3 (2003).

12. FINAL REPORT, *supra* note 3, at 110. In *Envtl. Def. Fund v. E. Bay Mun. Util. Dist.*, 605 P. 1, 5 (Cal. 1980), the plaintiffs argued that the District should be required to avoid possible adverse impacts on the American River by diverting its contracted water farther downstream on the Sacramento River beyond its confluence with the American. The court held that such an attack on the point of diversion could be validly made.

13. *Nat'l Audubon Soc'y*, 658 P.2d at 709.

14. Envtl. Def. Fund v. E. Bay Mun. Util. Dist., No. 425955 at 23-46 (Cal. Super. Ct. Jan. 2, 1990). This holding is commonly referred to as the "Hodge decision" after its author, Judge Richard Hodge of the Alameda Superior Court.

15. *Id.* at 2, 108-11.

16. FINAL REPORT, *supra* note 3, at 99.

17. *Id.*

reasonableness under Article 10, Section 2 of the California Constitution, and in implementing *National Audubon*.[18]

F. The Commission Suggested that the Public Trust Might be Applied to Protect Instream Uses

Five years later in the luminous *National Audubon* opinion, the California Supreme Court expressly affirmed the authority of the State to re-examine existing water rights in light of changed circumstances and to modify them in order to protect public trust uses.[19]

G. The Commission Identified Physical Solution as a Means for Reconciliation

The physical solution doctrine was identified as a means for reconciling the needs of fish, riparian vegetation, and other wildlife in or near the American River with the contractual water rights of the East Bay Municipal Utility District.[20] The Commission's comments were inspired by that bitter conflict.[21] Over 10 years later, Judge Hodge embraced a physical solution in the seminal *Environmental Defense Fund v. East Bay Municipal Utility District* decision.[22]

III. NEVERTHELESS, THE COMMISSION'S PRINCIPAL RECOMMENDATIONS WERE IGNORED

None of the Commission's core recommendations were enacted. Its basic proposals were:

1. The State Water Resources Control Board should establish quantitative instream standards, on a stream by stream basis, to serve as a guide in determining whether water is available for appropriation, in setting permit and license conditions, and in acting on applications for change in point of version, place of use, or purpose of use.[23]

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18. *See, e.g., Envtl. Def. Fund*, No. 425955; *see also* Putah Creek Council v. Solano Irrigation Dist., No. 515766 (Cal. Super. Ct. Mar. 23, 2002).

19. Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 729 n.30 (Cal. 1983).

20. FINAL REPORT, *supra* note 3, at 115-17. "The concept of 'physical solution' is the accommodation of competing interests in the making of a Solomon-like decision that satisfies, to some degree, everyone's interest." 2 WATERS & WATER RIGHTS § 1404(c)(3) 14-58 n.268 (Robert Beck ed., 1991).

21. FINAL REPORT, *supra* note 3, at 116-17.

22. No. 425955, at 99 (observing that "[t]he physical solution fits hand in glove with the requirements for comprehensive planning elucidated by Audubon," Judge Hodge placed a variety of conditions on EBMUD's diversions in order to ensure protection of instream uses).

23. FINAL REPORT, *supra* note 3, at 125. This recommendation was essentially reiterated ten years later in the 1986 SIERRA NEVADA ECOSYSTEM PROJECT REPORT ("SNEP"), WILDLIFE RESOURCE CENTER REPORT No. 39 at 6 (University of California, Davis, June 1986).

2. Interim appropriations for instream uses should be available to ensure the maintenance of instream standards in the absence of Board permit proceedings to protect the public interest pending establishment of instream flow standards.[24]

3. The Resources Agency should be authorized to acquire water rights to preserve or enhance fish and wildlife resources or maintain instream standards in the absence of Board permit proceedings.[25]

IV. HAS PROGRESS BEEN MADE?

Many of the problems noted by the Commission continue today. In 1978, the Commission noted the inability of the Department of Fish and Game to make adequate studies of wildlife impacts when commenting on pending applications.[26] Today, the Department reportedly suffers from the same problems.[27]

The array of statutes attempting to deal with instream issues in the context of water rights has grown apace since 1978, but the legislative thicket is so qualified and hedged by reservations, conditions, and ambivalence, that water law experts can cite legislative intent for virtually any result.[28] For example, by statute the use of water for domestic purposes remains the highest and best use.[29] However, the SWRCB, when considering appropriation applications, must consider the relative benefits from all beneficial uses of water, "including but not limited to use for domestic, irrigation, municipal, industrial, preservation and enhancement of fish and wildlife, recreational, mining and power purposes, and any uses specified to be protected in any relevant water quality control plan. . . ."[30]

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24. FINAL REPORT, *supra* note 3, at 114-15.

25. *Id.* at 117-18.

26. *Id.* at 106.

27. *See* Don Thompson, *License Fees Increase During Budget Crunch*, ESPN Outdoors, *at* http://espn.go.com/outdoors/conservation/news/2003/0115/1493247.html (last visited Jan. 14, 2004) (copy on file with the *McGeorge Law Review*); Andrew Edwards, North Coast Journal Weekly, *State Resource Agencies Feeling Budget Heat*, *at* http://northcoastjournal.com/041703/news0417.html#anchor 583284 (Apr. 17, 2003) (copy on file with the *McGeorge Law Review*).

28. A recent commentator referred to the "incomplete and sometimes incoherent integration of environmental law and the water allocation system." Gregory S. Weber, *The Role of Environmental Law in the California Water Allocation and Use System: An Overview*, 25 PAC. L.J. 907, 968-69 (1993); *see also* ANNE J. SCHNEIDER, GOVERNOR'S COMMISSION TO REVIEW CALIFORNIA WATER RIGHTS, LEGAL ASPECTS OF INSTREAM WATER USES IN CALIFORNIA 77-113 (Staff Paper No. 6, Jan. 1978) (providing an earlier review of the statutory maze of the water allocation system).

29. CAL. WATER CODE §§ 106, 1254 (West Supp. 2004). Additionally, CAL. WATER CODE § 11900 requires that provision be made for the preservation of fish and wildlife in state water projects.

30. *Id.* § 1257. California Fish and Game Code section 1600 states in part:

> The protection and conservation of the fish and wildlife resources of the state are hereby declared to be of outmost public interest. Fish and wildlife are the property of the people and provide a major contribution to the economy of the state as well as providing a significant part of the people's food supply and therefore their conservation is a proper responsibility of the state.

CAL. FISH & GAME CODE § 1600 (West 1998).

SWRCB is further instructed to consider streamflow requirements proposed for fish and wildlife protection by the Department of Fish and Game, and authorized to establish such standards "as it deems necessary to protect fish and wildlife."[31] However, the SWRCB is not required to adopt such recommendations.[32]

Other legislation has been less ambiguous, or susceptible of varying interpretations:

1. *Designation of Rivers*: A number of rivers were designated under the state and federal Wild and Scenic Rivers Acts, thus limiting development that could adversely affect instream uses.[33]

2. *Environmental Safeguards on Transfers*: Both temporary and long term changes in the diversion, place of use, or purpose of use connected with transfers may now be approved only if they would not unreasonably affect fish, wildlife, or other instream beneficial uses.[34]

3. *Environmental Water Dedications*: In 1991, the California Legislature authorized the transfer and dedication of all, or part of, a water right for environmental purposes.[35] The water may be used to increase instream flows for fish, to improve the health of a river system, or to enhance, restore, or create wetlands.[36]

4. *Federal Water Projects Subjected to Statutory Greening*: In particular, the Central Valley Project Improvement Act of 1992 ("CVPIA") imposed several notable requirements on federal project operations.[37] It added fishery and wildlife protection to stated project goals, set ambitious goals for improvement of the anadromous fisheries, and dedicated additional water for fish and wildlife.[38] In addition, the CVPIA requires the Central Valley Project "to meet all obligations under State and Federal law . . . and all decisions of the (State Water Board)."[39]

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31. CAL WATER CODE § 1257.5 (West Supp. 2004).

32. *Id.*

33. NORRIS HUNDLEY, THE GREAT THIRST: CALIFORNIANS AND WATER, A HISTORY 375 (rev. ed. 2001); *see* CAL. PUB. RES. CODE §§ 5093.54, 5093.542, 5093.545 (West 2001); 16 U.S.C.A. § 1678(2) (West 2003).

34. CAL. WATER CODE §§ 1725, 1736 (West Supp. 2004).

35. 1991 Cal. Stat. ch. 663, § 2 (codified as CAL. WATER CODE § 1707 (West Supp. 2004)).

36. CAL. WATER CODE § 1707. However, a recent study found that the statute has been "severely underutilized." MOONEY & BURCH, *supra* note 11, at 3.

37. Pub. L. No. 102-575, 106 Stat. 4714 (1992).

38. *Id.* §§ 3406(b), 3406(g), 106 Stat. 4715, 4725. For an excellent discussion, *see* Clifford T. Lee, The History of the Central Valley Project's Environmental Obligations, Address at the American Bar Ass'n 18th Annual Water Law Conference (Feb. 25, 2000).

39. Pub. L. No. 102-575, § 3406(b), 106 Stat. 4714 (1992). In Natural Res. Def. Council v. Pattersen, 791 F. Supp. 1425, 1431 (E.D. Cal. 1992), Judge Karlton held that plaintiffs had standing to raise claims under section 5937 of the California Fish and Game Code against the Bureau of Reclamation for failing to keep fish below the dam in good condition.

5. *Federal Energy Regulatory Act ("FERA")*:[40] FERA was amended to give greater weight to environmental (i.e. instream) values in its re-licensing process. The very existence of the re-licensing process has led to improvements in releases for instream purposes. Recently, for example, resource agencies, along with conservation and recreation groups, agreed with the Pacific Gas and Electric Company to incorporate increased releases into the Feather River, in a Federal Energy Regulatory Commission ("FERC") license.[41]

6. *Urban Water Management Planning*: Urban water management planning was introduced in 1983.[42] Although principally directed at ensuring that urban water purveyors provide reliable water supplies to their customers, the contemplated result of conservation and more efficient use inevitably will affect the quantities of water available for instream uses. Analogous, but less detailed, provisions aimed at the conservation of agricultural water were enacted in 1986 and were followed by the authorization to institute management programs for agricultural water, in express recognition of fish, wildlife, recreational uses, and other environmental values.[43] In 2001, legislation was enacted to strengthen existing requirements that adequate water supplies be identified before certain major new projects are authorized by local governments.[44]

   Instream flow standards for coastal streams in Northern California are closer to becoming a mandated reality under legislation recently approved by the Governor. Under Assembly Bill 2121[45] the Water Board is required to adopt principles and guidelines for maintaining instream flows in coastal streams from the Mattole River to San Francisco, and authorized to adopt such principles and guidelines for other California streams.

7. *The California Environmental Quality Act ("CEQA") Readjusts Priorities*: CEQA makes it a state policy to "ensure that the long-term preservation of the environment shall be the quality criterion in

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40. 42 U.S.C.A. § 7172(a) (West 2003).

41. Jane Braxton Little, *Wide-ranging Deal Cut on Feather River*, SACRAMENTO BEE, Apr. 10, 2004, at B1.

42. 1983 Cal. Stat. ch. 1009, § 1 (codified as CAL. WATER CODE §§ 10610-10656 (West 1992)). Regional water management plans for public agencies in general were authorized in 2002 in legislation expressly recognizing the need to manage water in the interests of environmental as well as other needs. 2002 Cal. Stat. ch. 767 (codified as CAL. WATER CODE §§ 10530-10546 (West Supp. 2004)).

43. 1987 Cal. Stat. ch. 994 (codified as CAL. WATER CODE §§ 10800-10855 (West 1992)).

44. 1991 Cal. Stat. ch. 881 (codified as amended at CAL. WATER CODE §§ 10910-10915 (West Supp. 2004)).

45. 2004 Cal. Stat. ch. 943 (to be codified as CAL. WATER CODE §§ 1259.2, 1259.4).

public decisions."[46] Since the enactment of CEQA, many water projects and water gulping developments have been required to undergo self-evaluation in terms of their impacts on instream uses.[47]

V. COURTS FREQUENTLY MAKE UP FOR LEGISLATIVE AND ADMINISTRATIVE INACTION

Most of the progress toward greater protection of instream values has been made by the judiciary, rather than the Legislature or the SWRCB. While legislative enactments provided for somewhat cautious, largely voluntary planning schemes, the courts have brought new life to ancient common law doctrines and long ignored statutes in order to require consideration and protection of fish and wildlife.[48] The genius of *National Audubon Society* was to integrate the reasonable use standard of the state constitution with the public trust. As Justice Racanelli stated: "[a]ll water rights, including appropriative, are subject to the overriding constitutional limitation that water use must be reasonable.... The decision is essentially a policy judgment requiring a balancing of the competing public interests."[49]

Reasonable use, the constitutional lodestar of water rights, has been held to depend on various considerations, subject to changes in current conditions.[50] Reasonable use determinations cannot be reached *in vacuo*, isolated from issues of statewide importance.[51] The lodestone public trust decision on water rights is of course, *National Audubon Society v. Superior Court*.[52] In *National Audubon Society*, the California Supreme Court directly took on the pending clash between environmental protection and water rights and held that the State has an "affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible."[53] "In the new light of *National Audubon*," Justice Racanelli wrote, "the Board unquestionably possessed legal authority under the public trust doctrine to exercise supervision over appropriations in order to protect fish and wildlife."[54]

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46. CAL. PUB. RES. CODE § 21001(d) (West 2001).

47. *See, e.g.*, Protect the Historic Amador Waterways v. Amador Water Agency, 11 Cal. Rptr. 3d 104, 108-09 (Ct. App. 2004); Stanislaus Natural Heritage Project v. County of Stanislaus, 55 Cal. Rptr. 625, 629-30 (Ct. App. 1966).

48. *See generally* Clifford W. Schulz & Gregory S. Weber, *Changing Judicial Attitudes Towards Property Rights in California Water Resources: From Vested Rights to Utilitarian Reallocations*, 19 PAC. L.J. 1031 (1987).

49. United States v. State Water Res. Control Bd., 227 Cal. Rptr. 161, 187-88 (Ct. App. 1986).

50. Envtl. Def. Fund v. E. Bay Mun. Util. Dist., 166 P.2d 1, 6 (Cal. 1980).

51. Joslin v. Marin Mun. Water Dist., 429 P.2d 889, 894 (Cal. 1967).

52. 658 P.2d 709 (Cal. 1983).

53. *Id.* at 728.

54. *State Water Res. Control Bd.*, 227 Cal. Rptr. at 201. *See* Ronald R. Robie, *The Delta Decision: The Quiet Revolution in California Water Rights*, 19 PAC. L.J. 1111, 1141-42 (1987); Schulz & Weber, *supra* note 48. Apparently, the power extends to all sorts of water rights. State Water Res. Control Bd. v. United States,

A few years later, the Court of Appeals brought new life into the once moribund provisions of Fish and Game Code section 5937, characterizing it as a "specific legislative rule concerning the public trust."[55] Now, section 5937 serves as the criterion for public trust mandated fish standards.[56]

That same court held that even holders of pre-1914 water rights were subject to the stream diversion requirements of Fish and Game Code section 1600 et seq.[57] Streams protected by the public trust were construed to include those recreationally navigable: "[a] waterway usable only for pleasure boating is nevertheless a navigable waterway and protected by the public trust."[58]

Later, in 1992, a federal court held that the Federal Endangered Species Act may prevent otherwise lawful water diversions.[59]

VI. WHERE DOES THE FUTURE LIE?

A. Legislative Reform is Unlikely

For a variety of reasons, it seems doubtful that the Legislature will accept recommendations, even those as modest as that of the Commission. California's long history of local control over water resources has yielded reluctantly, and only under extreme pressure, to binding legislative directives. In order to remove opposition to the relatively modest and sensible proposal that adequate water sources be identified before large projects are approved, one State Senator took the remarkable step of publishing a letter in the Senate Journal purporting to bind her and an undefined group of "stakeholders" from introducing any other legislation "regarding the subject matter" for five years.[60]

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749 P.2d 324, 338 (Cal. 1998) (holding that a public trust claim may apply to riparian waters on federal reserved lands).

55. Cal. Trout, Inc. v. State Water Res. Control Bd., 255 Cal. Rptr. 184, 211, 213 (Ct. App. 1989).

56. *Id.* at 196, 209.

57. People v. Murrison, 124 Cal. Rptr. 2d 68, 77 (Ct. App. 2002). California Fish and Game Code sections 1600-04 impose instream protections against the substantial impacts of proposed projects on fish and wildlife. Generally, they require that the project proponent enter into an agreement with the Department of Fish and Game for the protection of these resources. CAL. FISH & GAME CODE §§ 1600-04 (West 1998).

58. *Nat'l Audubon Soc'y*, 658 P.2d at 720 n.17; *see* PG&E Co. v. Superior Court, 193 Cal. Rptr. 336, 338 (Ct. App. 1983); People ex rel. Younger v. County of El Dorado, 157 Cal. Rptr. 815 (Ct. App. 1979); People ex rel. Baker v. Mack, 97 Cal. Rptr. 448 (Ct. App. 1971).

59. United States v. Glenn-Colusa Irrigation Dist., 788 Fed. Supp. 1126, 1134 (N.D. Cal. 1992). A similar result was reached with respect to the California Endangered Species Act in *Dept. of Fish & Game v. Anderson-Cottonwood Irrigation Dist.*, 11 Cal. Rptr. 2d 222, 230-31 (Ct. App. 1992); *see* Sandra K. Dunn, *Endangered Species Versus Water Resources Development: The California Experience*, 25 PAC. L.J. 1107, 1109 (1994).

60. Letter from Sheila James Kuehl, California Senator, to John Burton, California Senate President pro Tempore (Sept. 14, 2001) *in* Senate Daily Journal 2953, 3039-40 (2001-2002).

B. Administrative Reform, While Theoretically Easier, Seems Equally Remote

Although the California Supreme Court has expressly rejected arguments that the public trust has been "subsumed" by California's constitutional water law provisions,[61] a recent SWRCB decision dealing with the Salton Sea found it unnecessary to consider public trust arguments on the ground that Water Code section 1736 effectively codifies the Board's duty to consider public trust uses.[62] While this would appear to be consistent with the Supreme Court's observation in *National Audubon Society* that the Board's statutory authority necessarily embodied public trust powers,[63] sweeping a public trust analysis under a somewhat more limited statutory rug runs dangerously close to adopting the "subsumption" argument rejected in *National Audubon Society*.

Similar problems exist in undertaking a "balancing" of public trust with other arguably reasonable uses. In the *Environmental Defense Fund v. East Bay Municipal Utility District* case, Judge Hodge found, "[i]n assessing appropriative values versus public trust values, it is impossible to avoid a balancing analysis" invoking such factors as "water quality; costs; fisheries; riparian interests; and so on."[64] Then he went on to state, "[p]ublic trust doctrine occupies an exalted position in any judicial or administrative determination of water resource allocation."[65] Such an ambivalent analysis is inevitable in light of *National Audubon's* recognition that, "[a]s a matter of practical necessity the state may have to approve appropriations despite foreseeable harm to public trust uses."[66] Nevertheless, there is concern that mixing the trust into a broth of reasonable consumptive uses bears the risk of rigging the scales.

C. SWRCB Runs Aground in Groundwater

One major distinction between groundwater and surface water is that California's regulation of the latter is much more extensive than that of the former. Recently, the SWRCB commissioned a study of the relationship of groundwater to surface water. Important as it is, this issue is a relative sidebar to

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61. *Nat'l Audubon Soc'y*, 658 P.2d at 727. The City and state defendants had successfully argued in trial court that the constitutional reasonable and beneficial use standard precluded independent public trust scrutiny. A summary of the pleadings is included in a law review comment, in which the writer noted that adoption of the proposal would have merely retained the present allocation scheme while remedying none of its failings. Martha Guy, Comment, *The Public Trust Doctrine and California Water Law: National Audubon Society v. Department of Water and Power*, 33 HASTINGS L.J. 653, 681 (1982).

62. S.W.R.C.B. Order No. WR 2002-13, at 19 n.5 (Oct. 28, 2002). Section 1736 provides that the board may approve long-term transfers where the change would not result in substantial injury to any legal user "and would not unreasonably affect fish, wildlife, or other instream beneficial uses." CAL. WATER CODE § 1736 (West Supp. 2004).

63. *Nat'l Audubon Soc'y*, 658 P.2d at 728 n.27.

64. Envtl. Def. Fund v. E. Bay Mun. Util. Dist., No. 425955, at 29 (Cal. Super. Ct. Jan. 2, 1990).

65. *Id.* at 27.

66. *Nat'l Audubon Soc'y*, 658 P.2d at 728.

the controversy over groundwater controls in general. The fact that a proposed solution generated fiery controversy and was filed virtually without discussion is indicative of how difficult administrative reform is under present circumstances.

California's lack of statewide groundwater regulation is somewhat of a cause to celebrate. Ten years ago, the authors of an authoritative law review article on the subject decried the growing overdraft of ground water.[67] Characterizing the current state of California groundwater law as "the right to pump as much water as possible until one is sued,"[68] they went on to state, "[t]he time is long past for comprehensive groundwater regulation in California. The failure of Californians to act will not make the problem disappear."[69]

One might well expect that the body of murky and obsolete law in the subject deserves reconsideration by the State agency responsible for administering water rights. However, a report dealing with the relation between groundwater and subterranean streams, prepared by one of the State's principal authorities in water law, was filed, but never seriously considered by the Board.[70] Interestingly enough, the report, subsequently published as a law review article, noted that developments in adjudicating conflicts between surface and groundwater claimants have generally taken place in the courts, not by the Board.[71]

VII. CONCLUSION

In 1951, then California Attorney General Edmund G. Brown issued a formal opinion concluding that the Legislature, in authorizing Friant Dam, had accepted the premise that one result would be the drying up of the San Joaquin river below the dam.[72] He cited the widely recognized right of water users "to take the whole stream" a theory reflected in Water Code section 106.[73] Twenty-three years later, Attorney General Evelle Younger overruled that opinion, citing "numerous changes in the law and development of state policy relating to preservation of fish and wildlife."[74] There has undoubtedly been a change in social attitudes toward the use of water and the values that must be protected when it is diverted.

Nevertheless, the courts have not given instream trust values the priority some have argued they should receive. The *National Audubon Society* decision rejected the city's argument that Water Code section 106 gave domestic uses

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67. Eric L. Garner et. al., *Institutional Reforms in California Groundwater Law*, 25 PAC. L.J. 1021, 1021 (1994).

68. *Id.* at 1022.

69. *Id.*

70. *See* Joseph L. Sax, *We Don't Do Groundwater: A Morsel of California Legal History*, 6 U. DENV. WATER L. REV. 269, 288 n.110, 291 (2003).

71. *Id.* at 313-15.

72. 18 Op. Cal. Att'y Gen. 31, 32 (1951).

73. *Id.* at 37.

74. 57 Op. Cal. Att'y Gen. 577, 579 (1974).

preference by declaring them to be the 'highest use."[75] The court concluded that "*neither* domestic and municipal uses nor instream uses can claim an absolute priority."[76]

Another more recent example of what might portend in the field comes from the Nevada Supreme Court in a case remarkably similar in its facts to the Mono Lake litigation.[77] In that case, the court was asked to apply the public trust to limit destructive diversions from Walker Lake, a desert lake that by 1996 was only fifty percent of its 1882 surface area and twenty-eight percent of its volume.[78] Although the court declined to intervene, concluding that a concurrent federal court proceeding was a more appropriate forum, two justices concluded that:

> If the current law governing the water engineer does not clearly direct the engineer to continuously consider in the course of his work the public's interest in Nevada's natural water resources, then the law is deficient. It is then appropriate, if not our constitutional duty, to expressly reaffirm the engineer's continuing responsibility as a public trustee to allocate and supervise water rights so that the appropriations do not "substantially impair the public interest in the lands and waters remaining." [T]he public trust is more than an affirmation of state power to use public property for public purposes. It is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust. Our dwindling natural resources deserve no less.[79]

Another drought of the magnitude of 1976 may be necessary to galvanize the Legislature into action on the subject of water rights and instream uses. Major water reform seems to be the political third rail of natural resources legislation. Meanwhile, it has been left to the courts in specific cases to affirm what receives so much lip service and so little actual implementation in other forums: that the public interest in water and its uses is pervasive and demands continuing supervision under the public trust and the public interest.

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75. Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 729 (Cal. 1983)

76. *Id.* at 729 n.30 (emphasis added); *see* Arthur Littleworth, *The Public Trust and the Public Interest,* 19 PAC. L.J. 1201, 1208-09 (1988).

77. Mineral County v. State Dept. of Conservation & Natural Res., 20 P.3d 800 (Nev. 2001).

78. *Id.* at 303.

79. *Id.* at 808-09.